Office-Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1963

No. 1083

FRANCIS J. DESISTO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

There was an opinion by the United States Court of Appeals, For the Second Circuit, Appendix A.

Statement of Grounds of Jurisdiction

1. The judgment of affirmance of the United States Court of Appeals, For the Second Circuit, was entered March 30, 1964.

2. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. Section 1254.

Constitutional Amendments Involved

1. Fifth Amendment, U. S. Constitution.

Indictment

Petitioner was indicted for hijacking, on September 1, 1959, in Brooklyn, New York, a truck load of imported goods in violation of U. S. C. Sec. 1951.

Questions Presented for Review

A. Was petitioner denied a fair trial and deprived of his liberty without due process of law:

1) The positive identification by sole witness, on direct, turned to reasonable doubt, on cross, after DeSisto took off his coat and disclosed the tattoo marks on his arms (man on running board of truck had no tattoo marks): Did not such crucial uncertainty create a reasonable doubt as a matter of law?

2) When the alleged constructive possession of stolen goods was based on a complex of uncertainties and speculations as to create a reasonable doubt as a matter of law?

3) When the petitioner's alibi was supported by Government witness as to essential time element;—proving that petitioner was telephoning to the Government witness at the very time the robbery occurred?

4) Together, 1), 2) and 3), constitute a combination of unique circumstances,—beyond the category of ordinary conflicts settled by a jury's verdict. Do not such extraordinary situations require the exercise of the appellate function to declare that there is a reasonable doubt as a matter of law?

5) When trial judge admitted prior identifications of the petitioner in alleged "lineup", from a photo before the

Grand Jury, from testimony at first trial, and from a photo in office of United States Attorney just before the second trial—both by the witness and by several government agents as to what the witness said on identification?

6) The Government witness, Fine, made no inconsistent statement. Was it not reversible error for the trial judge to charge: "Now this inconsistent statement that the witness made prior to trial not under oath, is not to be accepted as affirmative proof on the issue but only brought before you as impeaching testimony"?

7) When the trial judge gave a definition of constructive possession of stolen goods—described as "brief" in Circuit Court's opinion—was it not inadequate and prejudicial as applied to the facts of this case?

8) Judge's charge omitted any reference to the dramatic disclosure for first time in court of the large tattoo marks on arms of petitioner, and its effect in modifying the opinion of sole identification witness from certainty to one of reasonable doubt. Did not judge's silence practically and prejudicially nullify this vital evidence favoring petitioner? Is not such error so plain as to require reversal regardless of no exception?

Statement of Case

Originally, the indictment included three defendants: Francis J. DeSisto, Frank LoCicero and Joseph Saponaro. The third defendant, Joseph Saponaro, was also indicted for possession of stolen goods. Count One, obstruction etc. of foreign commerce by robbery, was dismissed as to Saponaro before trial. DeSisto and LoCicero were tried before a jury on Count One, and Saponaro on Count Two.

as to possession. The Court directed a verdict for Saponaro on Count Two as to possession, the jury acquitted LaCicero and convicted DeSisto on Count One, the robbery.

1. DeSisto's triple defense creates a reasonable doubt as a matter of law.

The Circuit Court states in its opinion that "DeSisto's chief defense was an alibi". A more complete summary would be that DeSisto had a triple defense: (a) That the prosecution's sole witness as to identification, by modifying his positive testimony on direct, to one of reasonable doubt on cross-examination, after disclosure for first time, in court, of the large, striking tattoo marks on DeSisto's arms, created a reasonable doubt as a matter of law; (b) A similar reasonable doubt arises from appellant's alibi,—because DeSisto's claim that he was telephoning Government witness at time of robbery, about 3:15 P.M., was supported by the Government witness, Sidney Cleveland, who testified that appellant, whom he knew, telephoned him for a truck at the very time the robbery was taking place; and (c) DeSisto's rental lease of a truck from Cleveland, the Government witness, for a few days, was limited to end of week because truck had been rented to another customer beginning Saturday of that week, and on that Saturday night a third party placed the truck in a public garage, and next day, Sunday, September 6, 1959, the stolen goods were found in that truck. In such an extraordinary situation who had control or constructive possession? Nobody can decide with any reasonable certainty and, therefore, there is a reasonable doubt as a matter of law.

2. Fine's unchanging position: No tattoo marks on arms of man on running board.

Norman Fine, the truck driver, testified that in the afternoon of September 1, 1959, at Carroll and Hicks Street, Brooklyn, his truck was hijacked by a man who ran upon the running board, and forced him to turn over his truck with its load of silk (Tr. 41-42).

In his report of the robbery on September 1, 1959, Fine omitted any mention of tattoo marks. In the second trial, Fine repeatedly testified that the man on the running board had no tattoo marks on his arms. The arms of the robber were uncovered. Fine saw the man and his arms clearly, at close range. Asked specifically, on cross, did the man have tattoo marks on his arms, Fine answered *"He did not"* (Tr. 102). And again, the same positive answer: *"He did not"* (Tr. 103). "You didn't see any tattoo marks on his arms? A. Right" (Tr. 110). Fine never told anyone that the robber had tattoo marks. He never saw any tattoo marks (Tr. 153). And to clinch the issue, Fine was again asked whether he was able to see the arms of the man on the running board: *"Q. Did those arms have any tattoo marks? A. No"* (Tr. 156).

3. After disclosure for the first time, on cross-examination, of the striking tattoo marks on DeSisto's arms, Fine modified his positive identification to one of reasonable doubt.

DeSisto was asked, on cross, to take off his coat and stand in front of the witness and the jury. Now for the first time, the witness had a complete view of the petitioner. With that dramatic demonstration, Fine's former positive identification crumbled. He was asked: "Can you now say that DeSisto is the man?" And the answer came swiftly, definitely, "No, Sir" (Tr. 111).

After that honest admission by Fine that he could no longer say that DeSisto was the man on the running board, the prosecution tried to reconstruct the broken pieces.

4. Questions about prior identification failed to remove Fine's serious doubt. He ended with a reasonable doubt because man on running board had no tattoo marks.

Fine was asked, was he not shown a photo of DeSisto's face in September 1959, before the Grand Jury, and did he not say that he had no doubt as to identification? He had done so. And had he not made a positive identification at the first trial? He had. And again had he not been shown the same photo of the face of DeSisto—used before Grand Jury—and had he not identified the defendant in the United States Attorney's office? He answered that he had so identified (Tr. 198, 212, 227). And on September 5, 1959, at a so called "lineup", had Fine not identified DeSisto? He did. There were DeSisto, a codefendant, and one F. B. I. agent. There was some testimony by the Government that there were two agents in this "lineup". But whether one or two agents, such a "lineup" was a make-believe, a phantom lineup. No report was made by the F. B. I. agent about this "lineup", nor how made up, nor how the individuals were dressed. This practically destroys the value of the identification and the claim that tattoo marks were visible at that "lineup". Fine, while admitting that he identified DeSisto at that time, added that his first knowledge about DeSisto having tattoo marks came from looking at a photo of DeSisto with tattoo marks on his arms, and that this photo was shown *to Fine only a few days before the second trial in February 1963* (Tr. 232, 238).

From that first photographic proof, a few days before the second trial, Fine began to doubt the accuracy of his

identification of the man on the running board. That man had no tattoo marks. Fine then expressed his first doubt to the Government agent and to the Assistant United States Attorney in the latter's office (Tr. 239, 245).

Thus doubt was confirmed and deepened by the graphic demonstration in Court. Because the man on the running board had no tattoo marks, and DeSisto had them on both arms, do you now have a reasonable doubt as to whether DeSisto was the man on the running board? He replied "Yes" (Tr. 240), and again to the same effect (Tr. 257).

Even if there were admitted all prior identifications—whether out of court or in court—all based on an incomplete set of facts—that final opinion by Fine, near the end of the second trial, after a complete, clear view in court of DeSisto with the vivid tattoo marks on both arms, plainly visible, more than counterbalances the previous statements, it practically destroys them. At any rate, it plants an irrevocable doubt at the very heart of the prosecution's case.

5. Defendant's alibi supported as to pivotal time by Government witness, Sidney Cleveland.

a) *Sidney Cleveland testified that defendant phoned him about 3:15 P.M., September 1, 1959.*

Sidney Cleveland of the "Clesto" truck rental agency testified at the first trial in 1959, and because of his subsequent death, his testimony was read at the second trial. He was positive that it was approximately 3:15 P.M. He had a special reason for remembering (Tr. 422). (His partner, Philip A. Storck, testified that the time was 3:45 P.M. But at the first trial 3 years before, Storck had not mentioned any time, and he had no memorandum) (Tr. 436, 437).

b) *Defendant testified that he telephoned S. Cleveland, Government witness, at 3:15 P.M. on September 1, 1959.*

At the time of telephoning to the Government witness, the petitioner was at New Pompeii Restaurant at 11th Avenue and 68th Street, Brooklyn, where he had been since noon of that day, and left about 3:30 P.M. (Tr. 466-7).

c) *The robbery took place at about 3:15 P.M. at Carroll and Hicks Streets, Brooklyn.*

(1) The Pier 38 gateman, Hough, kept a time book of truck arrivals and departures. This book showed that Fine —driver of truck later hijacked—checked out with his truck at 3:00 P.M. (Tr. 559).

(2) Fine admitted that if he left Pier 38 about 3:00 P.M., he would have arrived at Carroll and Hicks Streets between 3:10 and 3:15 P.M. (Tr. 139).

(3) Fine told the F.B.I. agent on September 1, 1959 that he left Pier at approximately 3:00 P.M. and the F.B.I. agent's report for September 1, 1959 contained statement that Fine said he had left pier about 3:00 P.M. (Tr. 134).

6. "Constructive Possession" of stolen goods based on such speculative basis as to create reasonable doubt as a matter of law.

a) DeSisto at 3:15 P.M., September 1, 1959, telephoned Government witness, S. Cleveland, who knew him, for the rental of a truck, and signed the lease in his own name and giving his own address (Tr. 468).

b) The lease was to end on Saturday, September 5, 1959, because Cleveland added that he had arranged to rent the truck to another customer, starting Saturday, September 5, 1959 (Tr. 410).

c) Several times later during week, DeSisto phoned Cleveland to explain delay in return of truck (Tr. 477).

d) A third party placed the truck in a public garage on Saturday night, September 5, 1959. And the stolen goods were found in the truck, in that garage, on Sunday, September 6, 1959 (Tr. 575).

Since DeSisto's lease, for less than week, expired on Saturday, September 5, 1959, who had control of truck on Sunday, September 6, 1959? And since a third party placed truck in public garage, did this third party have control on Sunday, September 6, 1959? Or did some other stranger use the truck for temporary storage? Would a robber sign his own name and address to a lease on very afternoon of robbery? Since nobody can answer with fair certainty, there arises a reasonable doubt as a matter of law. Support for this view is found in *U. S.* v. *Weiner*, 170 F (2) 603, 606; *U. S.* v. *O'Brien*, 174 F (2) 341, 345; and *U. S.* v. *Russo*, 123 F (2) 420, 422.

7. Errors in Charge.

a) *The trial judge omitted from his charge any reference to disclosure of tattoo marks in court.*

There had been an unusual scene. There was positive identification on direct. The man who was on running board had no tattoo marks on his arms and that position had been maintained by the witness from the beginning. Then the petitioner stood up and took off his coat. The large, striking tattoos on both arms were clearly visible. Effect: witness could no longer say—"this is the man" (Tr. 111).

It is irrelevant to discuss, as the Circuit Court does, what might have happened if the Court had included this unusual

development in the charge. By leaving it out completely, the Court told the jury indirectly but plainly, that such testimony had no weight and could be disregarded. Such prejudicial and obvious error should be considered regardless of no exception.

b) *The charge applied inadequately the Court's definition of "constructive possession".*

The Circuit Court of Appeals opinion says the definition was "brief". That is only a part of its inadequacy. The charge did not apply it adequately to the facts of the case. It did not point out that DeSisto's short lease had expired on Saturday, September 5, 1959; that the truck had been rented to another customer for Saturday, September 5, 1959; that a third man had placed the truck in a public garage on Saturday night, September 5, 1959; and that in public garages, many others have access to the vehicles.

c) *No prior inconsistent statements by Fine, sole identifying witness.*

From the day of the robbery, September 1, 1959, to the second trial in March 1963, *Fine took one consistent position: the man on the running board had no tattoo marks.* And on direct, at second trial, as on several prior occasions, he positively identified DeSisto as the man on the running board.

However, when for the first time, at the second trial, DeSisto took off his coat, and disclosed the large, striking tattoo marks on both arms, Fine then stated that he had a reasonable doubt, and that he could no longer say that DeSisto was the man who jumped on his running board (Tr. 111; 240; 257).

That modification was not inconsistent with his prior identifications. It was a modification produced by new evi-

dence, a complete view of the petitioner. Fine's prior identifications—out of court and in court—were based on the impression of a man on running board whose arms were bare and who had no tattoo marks. His final opinion was founded on new facts—the striking proof that DeSisto was a man with tattooed arms, and, consequently, not the man on the running board of the hijacked truck.

Therefore, it was prejudicial error for the trial judge, without elucidating, to state incorrectly that there had been a prior inconsistent statement: "Now this inconsistent statement that the witness made prior to trial, not made under oath, is not to be accepted as affirmative proof on the issue but only brought before you as impeaching testimony" (Tr. 723-4).

8. Cardozo's Rule in New York as to inadmissibility of prior identification—except under special impeachment circumstances—is wiser and should be adopted.

The opinion of the Circuit Court of Appeals endeavours to combine two totally different things. Can a witness's prior inconsistent statements be admitted only to impeach his credibility, or also as substantive proof? Scholars and Courts have divided and the debate continues on that question.

However, there are no inconsistent statements in DeSisto. So the issue before us is more limited: Can prior consistent identifications—some under oath and some not—be admitted? The Circuit Court of Appeals in its opinion in this case and in that of *United States* v. *Kaliner*, 317 U. S. (2) 345, in which it left the issue open as to the effect of inconsistent statements, relies heavily on what it called "the pioneering opinion" of *Judge Hand in DiCarlo* v. *United States*, 6 F (2) 364, and also upon the writings of a number of competent scholars. And it is true that DiCarlo has been

followed in *United States* v. *Forzano*, 190 F (2) 687, and in *Eidson* v. *U. S.*, 272 F (2) 684. However, an opposing opinion as to inconsistent statements was expressed in *Ellis* v. *U. S.*, 138 F (2) 612.

Against that rule now advocated by the Circuit Court of Appeals without conditions—except that the prior identification be under oath or later vouched for under oath—we counterpose the wiser rule of Cardozo that prior identifications should not be admissible unless the witness had been specially impeached. For example, in *People* v. *Bertini*, 218 N. Y. 584, on cross-examination of the complainant, there was an intimation that the identification was the product of suggestion by police. Cardozo wrote, page 589:

> "Our conclusion is that Mrs. Bossis' identification of the defendant has been assailed as inspired by the police, that to meet this assault the People had the right to show that it was spontaneous and that they could do this, not only out of the mouth of Mrs. Bossis herself but also from the lips of others."

But where (as in DeSisto) there had been no impeachment, no charge of recent fabrication or that it was the product of suggestion by others, Cardozo concurred in the Courts' ruling that such prior identifications were inadmissible, *People* v. *Jung Hing*, 212 N. Y. 393, 401; *People* v. *Seppi*, 221 N. Y. 62.

While there was an unwise Baumes legislative amendment in New York in 1927 permitting a witness to testify as to a prior identification, the New York Courts have restricted its application. Only the victim may so testify, not a detective in the police station. *People* v. *Trowbridge*, 305 N. Y. 471; *People* v. *DeJesus*, 11 A. D. (2) 711; 204 N. Y. S. (2) 607; *People* v. *Insantino*, 224 A. D. 193, 230 N. Y. S. 66; *People* v. *Palladino*, 237 N. Y. S. (2) 266.

And identification from photos has been held inadmissible: *People* v. *Ciaffi*, 1 N. Y. (2) 70, 150 N. Y. S. (2) 192; *People* v. *Angorra*, 13 A. D. (2) 72, 213 N. Y. S. (2) 669; *People* v. *Hunter*, 12 A. D. (2) 835, 210 N. Y. S. (2) 4.

While the scholarly critics, cited by the Circuit Court, such as Wigmore, Evidence (3 Ed) Section 1130, and Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 H. L. R. 177, 196, support generally the admissibility of prior, consistent identifications, they add important qualifications. For example, Wigmore states that if the prior identification was made at a make-believe, not a genuine lineup, then its admission would be dangerous and unfair. Clearly, the "lineup" in the DeSisto case was exactly of that kind. And Morgan adds that sometime such prior identification might be excluded, not because hearsay, but "perhaps it ought not to be received because unnecessary." And that is a sound reason for exclusion in our case. Where the witness on direct has identified positively, how can you add to the probative value of that declaration? You only befog by putting in issue what may have happened in a police station three years before. With no written report of such an alleged "lineup", you add to the possibility of conflicts and contradictions as to who was there, how were they dressed, what was said, what was seen, what could be observed, etc. Instead of helping the jurors, such multiplicity of issues confuses, distracts and makes their task more difficult.

Nor do you eliminate the uncertainty of what occurred in police headquarters by claiming, as the Circuit Court does, that it was "vouched" for later. What actually happened there can't be reproduced, and the character of that prior identification remains "unsworn testimony", and in line with *Bridges* v. *Wixon*, 326 U. S. 135, 153-4 as to inconsistent statements, they should be excluded.

9. Ordinary conflicts can be settled by verdict of jury. Unique, extraordinary situations create a reasonable doubt as a matter of law.

The Circuit Court's opinion cites a number of cases where the evidence was held sufficient to sustain the verdict of guilt beyond a reasonable doubt. *U. S. v. Kahaner*, 317 F (2) 459, 467-8 (2 Cir.) Cert. denied, 375 U. S. 835, 836 (1963); *U. S. v. Lefkowitz*, 284 F (2) 310, 315; *U. S. v. Robertson*, 298 F (2) 739, 741; *Cuthbert v. U. S.*, 278 F (2) 220, 224. But the conflicts in those cases were all ordinary conflicts. For example, in Kahaner, were certain payments made? A said Yes; B said No. The jury believed A and not B.

Those cases of ordinary conflicts are totally distinguishable from DeSisto. Something unique happened in the courtroom. On direct, Fine, sole government witness, made a positive identification. And he stated repeatedly that the man on the running board of his truck had no tattoo marks on his arms. That position he maintained consistently from the start. Then DeSisto took off his coat and disclosed the large, striking tattoo marks on both arms. The impact on Fine was immediate. He could no longer say the defendant was the man. That is not a conflict between two inconsistent statements, based on the same facts. If before the disclosure of the tattoo marks on DeSisto, Fin. had said—"I am not sure"—then that statement would have conflicted with his prior identifications, and statement for statement, the earlier inconsistent statement might have been preferred by the jury or cast doubt on his credibility. Here the facts changed in open court. The new situation, not covered by any prior identifications, either in court or out of court, produced a different result, a modification in the testimony of the witness. By definition, such an unusual, almost unheard of situation creates a reasonable doubt as a matter of law.

So with the issue of the defendant's alibi. If there were only the testimony of the defendant, that would create an ordinary conflict, to be decided by the jury. But when the Government's own witness testified that the defendant telephoned him at the very time of the hijacking, then the events are unique and a reasonable doubt results.

Likewise, with the "constructive possession" of the stolen goods. We repeat: DeSisto's short lease of a few days had expired Saturday, September 5, 1959; the truck had been rented by the auto agency to another customer for that Saturday, September 5, 1959; a third person put the truck in a public garage that Saturday night, September 5, 1959; and the stolen goods were found in the truck on Sunday, September 6, 1959. By what principle, standard, or criterion can anybody decide rationally who had control of the truck on Sunday, September 6, 1959? These gaps cannot be bridged except by unchecked guesswork and blind conjecture.

It is beyond the competence of any trier of the facts to decide reasonably such a novel complex of uncertainties. It is precisely in such a combination of doubts that the appellate function must be asserted. The presumption of innocence and reasonable doubt, ancient and still valid principles, must be vindicated by the Supreme Court. There is no evidence to sustain a conviction when no clear light is visible in this darkness. Practically, it equals the "totally devoid of evidence" condemned in *Thompson* v. *Louisville*, 362 U. S. 199.

Reasons for Granting Writ

1. The Cardozo rule in N. Y. that prior consistent identifications are inadmissible, except when there are special impeaching circumstances, should be adopted and that of the Circuit Court rejected.

2. Since the Circuit Court's opinion raises the question of admissibility of prior inconsistent statements—although there are no prior inconsistent statements in this case—and, in effect, argues for restriction of *Bridges* v. *Wixon*, 326 U. S. 135, we submit that the principle of that case should be reaffirmed and extended to prior consistent identifications.

3. Even if all the prior identifications were admitted, being based on incomplete facts, they cannot eliminate a reasonable doubt. That is inevitably produced by Fine's final admission, after the tattoo marks were exhibited to him in court, that he could no longer say the petitioner, DeSisto, was the man on the running board. To convict under such circumstances is a denial of due process, and a denial of a fair trial. And as we have said: "A fair trial is the best test of whether a society is civilized, democratic and free."

4. While ordinary conflicts are settled by a jury's verdict, a different principle must be applied where the situation is unique and extraordinary. No jury can handle such a complex of uncertainties as exists in this case, and no jury can rationally bridge similar gaps in other cases. In such a setup, a reasonable doubt is created as a matter of law. If this principle is adopted in unique cases, the administration of justice will be promoted, fair trials better secured, and due process of law strengthened.

CONCLUSION

It is respectfully submitted that a Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 296—September Term, 1963.

(Argued January 23, 1964 Decided March 20, 1964.)

Docket No. 28342

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCIS J. DE SISTO,

Defendant-Appellant.

Before:

FRIENDLY and HAYS, *Circuit Judges*, and
ANDERSON, *District Judge.**

Appeal from a judgment of the District Court for the Eastern District of New York, Jacob Mishler, *Judge*, convicting appellant, after a jury trial, of hijacking a truck load of imported silk goods in violation of 18 U.S.C. 1951. Affirmed.

FRANK SERRO, Brooklyn, New York, *for Defendant-Appellant.*

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*Sitting by designation.

RAYMOND BERNHARD GRUNEWALD, Assistant U.S. Attorney (Joseph P. Hoey, United States Attorney, Eastern District of New York), *for Appellee*.

FRIENDLY, *Circuit Judge*:

On a former appeal, 289 F. 2d 833, 62 Cir. 1961), we reversed De Sisto's conviction for hijacking a truckload containing silk goods shipped from Japan in violation of 18 U. S. C. §1951, because of errors in the trial. After a new trial before Judge Mishler and a jury De Sisto was again convicted. His appeal raises questions as to the sufficiency of the evidence in the light of a change in the identification testimony of the truck driver on cross-examination, as to the evidentiary status of the driver's prior identification, and as to charges and omissions to charge. We affirm.

In the early afternoon of September 1, 1959, a truck containing 31 cartons of imported Japanese silk goods was hijacked ten or fifteen minutes after leaving Pier 38 in Brooklyn, while turning from Carroll into Hicks Street. Its progress there was blocked by an Oldsmobile parked at a 45° angle. A man, whom Fine, the truck driver, later identified as De Sisto, walked over from the Oldsmobile, climbed on the running board of the truck on the driver's side, and, with his face about 18 inches away, told Fine, "Look straight ahead, Wimpy, and do what you are told. Pull over to the curb. Don't touch the key. Put the brake on. Do as you are told or I will kill you." Fine complied. Later, as ordered, he descended from the truck, and was herded into the Oldsmobile where taped glasses were placed over his eyes. Two other men who had assisted in this maneuver drove him off to a remote area where he was left hand cuffed to a tree.

There was evidence that on the same afternoon De Sisto telephoned the Clesto Auto Service in Brooklyn, operated by two partners, Cleveland and Stork, to rent a large truck; that he drove to the Clesto garage in a Chevrolet accompanied by another man; that he signed a rental contract for a Clesto truck, paid a $50 deposit and drove it off; that the other man drove off in the Chevrolet; that although the truck was to be returned on Friday, September 4, De Sisto called on Friday and again on Saturday, saying that the truck couldn't be returned because it was loaded with furniture which wouldn't be moved until the place of prospective delivery was ready; that the FBI found the hijacked truck empty and abandoned on September 4; and that on Sunday, September 6, the authorities found in a Brooklyn garage the Clesto truck containing the 31 cartons of silk goods and nothing else.

De Sisto's chief defense was an alibi. He claimed that he made the telephone call from a restaurant at Eleventh Ave. and 68th Street between 3:15 and 3:45 P.M., a time corroborated by testimony given at the first trial by Cleveland, who had died in the interim, whereas pier records showed that Fine had checked out with his truck at 3:00 P.M. As against this Fine testified, although with some contradiction in an earlier statement, that he had left the pier about 2:45 P.M. to 2:50 P.M. and the accuracy of the pier records was challenged. Also, at the new trial, Stork testified he had been the first to talk to De Sisto on the telephone and placed the call around 3:45 P.M. on the basis that De Sisto had appeared at the garage at 4 P.M. and that he had remarked to De Sisto what a short interval had elapsed between the call and De Sisto's arrival. The 4:00 o'clock arrival was verified by the notation of 4:15

[1] Cleveland had said he had no reason for remembering the [illegible] some asked him what it was. De Sisto did not testify as to [illegible] the time so precisely.

P.M. as the time-out on the truck rental contract and by Cleveland's testimony that "the most the whole transaction could have taken" between the time De Sisto arrived and "the time I checked it out at 4:15 was the maximum of fifteen minutes." Beyond this De Sisto claimed that he had rented the truck for a friend, Joe Storch, who had joined him at the restaurant had paid the $50 deposit and had given De Sisto $10 for signing the contract; that they had come to the garage in De Sisto's Pontiac with a license number differing from that which had been noted on the Chevrolet; and that Storch had driven the truck and De Sisto the Pontiac away from the garage.

Assuming as we do that the Government was required to adduce evidence sufficient that a reasonable juror could be convinced of the guilt of the defendant beyond a reasonable doubt, *United States* v. *Kahaner*, 317 F. 2d 459, 467-68 (2 Cir.), cert. denied, 375 U. S. 835, 836 (1963); *United States* v. *Letkowitz*, 284 F. 2d 310, 315 (2 Cir. 1960); *United States* v. *Robertson*, 298 F. 2d 739, 741 (2 Cir. 1962); *Cuthbert* v. *United States*, 278 F. 2d 220, 224 (5 Cir. 1960), we think it plain that the evidence we have summarized—and there was more that we have not—amply passed that test if Fine's identification held. Not seriously challenging this, appellant argues that the identification was destroyed and that the Government's case fell with it.

In his direct testimony, Fine, after relating how he had seen the face of the hijacker, made a positive identification of De Sisto as he had done at the first trial. But on cross-examination, after admitting that he had noticed the arms of the man on the occasion of the hijacking, he said he had seen no identifying marks and specifically no tattoo marks upon them. Defense counsel then had De Sisto remove his jacket to reveal large tattoo marks on the outside upper and lower portions of his arms, which he concededly bore in 1959. On further questioning Fine stated he could

not say that De Sisto was the man who jumped on his truck.

The Government set about to repair the damage on redirect. Over objection Fine was allowed to testify that on September 1, 1959, he had told the FBI that his assailant was "A man approximately six feet tall, round face, heavy lips, one day or two days growth of stubble on his face, apparently Italian, heavy set, I think around 200 pounds, 180, 190, something to that effect, sir"—apparently a good description of DeSisto. He also was allowed to testify that on September 5, at FBI headquarters, he had picked De Sisto out of a line-up of four men; that he had identified a photograph of De Sisto's face before the grand jury on September 17; that he had again identified De Sisto at the first trial in November, 1959; and that he had identified a photograph of De Sisto's face in the United States Attorney's office shortly before the second trial. Further examination by both sides brought out that Fine had been told of the tattoo markings while he was being prepared to testify at the second trial and that when photographs of De Sisto's arms, taken at the line-up, were shown to him at his request, he had told the prosecutor that the man who jumped on the truck didn't have such marks and that he was now in doubt as to the identification—a doubt to which he adhered through a long examination. Two FBI agents who had attended the line-up testified, over objection, that De Sisto was then wearing a tee-shirt and that the tattoo marks were plainly visible.

We interrupt our discussion of the sufficiency of the evidence to consider appellant's objection to the receiving of Fine's prior identifications and the related testimony of the FBI agents. In the course of the Government's pre-

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[2] De Sisto had displayed his arms during his own testimony at the first trial, and argument was made as to Fine's failure to refer to this in his description to the FBI, but Fine was not cross-examined on the point.

tation of evidence of Fine's prior identifications, defense counsel sought an instruction to the effect that these could be considered only as bearing on Fine's present credibility but not as substantive evidence. Receipt of this testimony without such a limitation is now claimed to have been error which was not cured when, several days later, the judge included in his charge a general instruction that an inconsistent statement by a witness "made prior to trial, not made under oath, is not to be considered as affirmative proof on the issue but only brought before you as impeaching testimony." Accepting that the charge would not correct the claimed error under the circumstances here presented,[4] we are thus confronted with the issue as to the evidentiary status of prior statements which, in *United States* v. *Kahaner*, *supra*, 317 F. 2d at 474, we were able to "leave for another day."

The rule limiting the use of prior statements by a witness subject to cross-examination to their effect on his credibility has been described by eminent scholars and judges as "pious fraud," "artificial," "basically misguided," "mere verbal ritual," and an anachronism "that still impede(s) our pursuit of the truth." Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 193 (1948); *United States ex rel. Na Kee Wong* v. *Corsi*, 65 F. 2d 564, 565 (2 Cir. 1933, Judge Swan); McCormick, Evidence 77 (1954); *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 934 (2 Cir. 1957, Judge L. Hand). See

[4] The prior statements here at issue can be regarded either as inconsistent with and adversely affecting the credibility of Fine's partial recantation, or as consistent with and supporting the credibility of his identification on direct examination; cf. *United States* v. *Farnese*, 199 F. 2d 687 (2 Cir. 1953).

[4] Apart from the lapse of time and the generality of the instruction, the charge was unsatisfactory on appellant's view of the law in that the only prior statements ruled out as affirmative proof were those not made under oath.

also 3 Wigmore, Evidence, 1018 (3d ed. 1940); ALI, Model Code of Evidence, Rule 503 (1942); Judge L. Hand in *Di Carlo v. United States*, 6 F. 2d 364, 367-68 (2 Cir.), cert. denied, 268 U. S. 706 (1925); and the ruling of Mr. Justice Van Devanter at the trial in *United States v. Graham*, stated in Morgan, *supra*, 62 Harv. L. Rev. at 194, fn. 39, aff'd. 102 F. 2d 436 (2 Cir.), cert. denied, 307 U. S. 643 (1939). The sanctioned ritual seems peculiarly absurd when a witness who has given damaging testimony on his first appearance at a trial denies any relevant knowledge on his second: to tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this the orthodox rule defies the dictate of common sense that "The fresher the memory, the fuller and more accurate it is . . . Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy . . . [but] the greater the lapse of time between the event and the trial, the greater the chance of exposure of the witness to each of these influences." McCormick, Evidence, 75-76 (1954). As against this, we are bound by the admonition in *Bridges v. Wixon*, 326 U. S. 135, 153-54 (1945), against allowing "men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded."

Whether or not this ruling in *Bridges v. Wixon* will survive the attacks of scholars, see, e.g., Morgan, *supra*, 62 Harv. L. Rev. at 192-96; McCormick, Evidence 78-82 (1954), we do not think the Supreme Court meant to require rigid adherence to the much criticized orthodox rule in the situation here presented where the prior statements were

themselves testimony before a grand jury or at a former trial or were adopted by such testimony. The *Bridges* opinion emphasized that the statements there received as substantive evidence were simply a stenographer's notes of an investigative interview, whose accuracy the witness denied. "A written statement at the earlier interviews made out and signed '. . . would have afforded protection against mistakes in hearing, mistakes in memory, mistakes in transcription. Statements made under those conditions would have an important safeguard—the fear of prosecution for perjury." 326 U. S. at 153. These comments are inapplicable to testimony, transcribed by a court reporter, before a grand jury or at a former trial. Testimony at a former trial has already been once subjected "to the test of Cross-Examination" on which our law places primary reliance for the ascertainment of truth. 5 Wigmore, Evidence, §1362 (3d ed. 1940). Both such testimony and evidence before a grand jury have had the sanction of what Wigmore calls the "prophylactic rules" relating to the oath and to perjury, influencing "the witness subjectively against conscious falsification, the one by reminding of ultimate punishment by a supernatural power, the other by reminding of speedy punishment by a temporal power." 6 Evidence, §§1813, 1831 (3d ed. 1940)—with the oath administered not in any perfunctory fashion but in a setting calculated to impress the witness with the gravity of the responsibilities assumed. And in the case of identification testimony, we think the exception to the orthodox rule which seems to be permitted by the *Bridges* opinion may properly embrace not only testimony so given but the even more probative consistent earlier identifications for which the witness has later vouched under oath in the secrecy of the grand jury room or at a former trial. See Judges L. Hand and Hough in *Di Carlo* v. *United States*, 6 F. 2d 364, 366, 369 (2 Cir.), cert. denied, 268 U. S. 706 (1925); Judge A. N. Hand in

United States v. Forzano, 190 F. 2d 687 (2 Cir. 1961); 4 Wigmore, *supra*, (1130; McCormick, Evidence, *supra*, 108-09.

The desirability of qualifying the orthodox rule to the extent indicated is illustrated by the circumstances of this case. The fact that Fine, only four days after the incident, had picked De Sisto out of a line-up with the latter's tattoos in full view, and had there after made a positive identification before the grand jury, at the first trial, and on other occasions, warranted a variety of inferences that would sustain his identification and discredit his doubts. It afforded a basis for the jury's thinking he had not in fact had an opportunity to observe these parts of De Sisto's arms during the hijacking; indeed Fine testified at the first trial that De Sisto had climbed onto the running board and, with both hands had held onto the steel top frame of the cab—a position which would expose the insides, but not the tattooed outsides, of his arms to the driver. It could also be that with Fine's other preoccupations during the hijacking, the tattoo marks made no impression on him, of that though he had in fact recalled the marks at the line-up on September 5, 1959, he had forgotten them in the three and a half intervening years. It would be perfectly rational for the jury to decide that, for these reasons or for others not requiring mention, Fine's identification at the first trial and on direct examination at the second, was more credible than the doubt he expressed about the tattoos. Consideration of such matters by a jury in a criminal case—the task which jurors are superbly equipped to perform—ought not be impeded by directing them to make a discrimination so elusive that it can scarcely be retained by a trained legal mind, let alone be applied by laymen in determining the guilt or innocence of an accused.

With the challenged evidence thus admissible, the attack on the sufficiency of the Government's case must fail. Fine's

assertion that he had come to have a reasonable doubt over his identification would not require a reasonable juror to have one as to De Sisto's guilt, particularly when the identification testimony was taken with the other evidence implicating him.

Appellant's first complaint as to the charge concerns the judge's failure to make specific comment on the change in the identification testimony. We should not consider this to have been error even if proper request had been made or exception taken. The point had been made dramatically by defense counsel in cross-examination and was extensively argued in the summations; the jury could not possibly have thought that the judge's entirely fair instruction on identification was meant to belittle an incident so deservedly featured. *See United States* v. *Kahaner*, *supra*, 317 F. 2d at 479-82. Had the judge chosen to make specific comment, he could not properly have dwelt only on the aspect favorable to De Sisto but would also have had to state the countervailing considerations, and the net effect might have been less favorable to the defendant. In any event the lack of exception is decisive, F. R. Crim. Proc. 30, for reasons explained in *United States* v. *Kahaner*, *supra*, at 478-79.

The other criticisms relate to the instructions that a jury may reasonably draw the inference that a person in possession of recently stolen property participated in its theft, and that although De Sisto was not in actual possession of the goods, that inference could be drawn here if the Government proved beyond a reasonable doubt that he had constructive possession, which the judge defined as knowingly having "the power and the intention at a given time to exercise dominion or control . . ." Insofar as appellant claims that the only inference permitted from possession of recently stolen goods is guilty knowledge and not participation in the theft, it suffices to cite *McNamara* v.

Henkel, 226 U. S. 520, 524-25 (1913). The contention that the case was not a proper one for drawing an inference from constructive possession likewise fails. Although the inference was not so strong as if the stolen goods had been found in a room to which no one but De Sisto had had access since September 1, the evidence that he had rented the truck and then had postponed its return on the basis of a wholly unsubstantiated excuse afforded ample basis for logical inference-drawing. Although the judge's explanation of constructive possession was brief, we see nothing wrong with it, and what counsel asked was not that he expand it but that he withdraw it altogether.

Affirmed.